

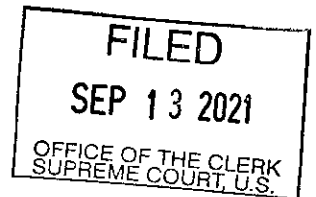
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In The  
**Supreme Court of the United States**

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BOB LEWIS,

*Petitioner,*

vs.

GOOGLE INC. and YOUTUBE LLC,

*Respondents.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Does this Court's holding in *Packingham v. North Carolina*, 137 S. Ct. 1730, at 1736-1736, 198 L. Ed. 2d 273 (2017) that First Amendment protections apply to social media platforms override 47 U.S.C. § 230's civil liability indemnification for censorship of constitutionally protected speech?
2. Does the Petitioner, whose constitutionally protected speech was censored and lost revenues as a direct result of the Respondents' claim he violated their "hate speech" policies, lack standing to challenge the constitutionality of 47 U.S.C. § 230 when the Respondents employ it as a liability defense?
3. Does 47 U.S.C. § 230 allow private third parties the unrestricted ability to regulate protected speech in violation of the United States Constitution's bar on Congress enacting laws that indirectly regulate protected speech in an unrestricted fashion?
4. Does the government's participation and encouragement of social media censorship based on "hate speech" transform the Respondents into joint-enterprise state actors when they censor the Petitioner's protected speech on their social media platforms in response?
5. Because 47 U.S.C. § 230 relies on vague language and/or does not define its terms to provide indemnification from civil liability for censoring constitutionally protected speech, is it itself unconstitutional?

**LIST OF PARTIES BELOW  
PURSUANT TO RULE 14.1(B)**

The Parties to the Ninth Circuit Court action below were, Bob Lewis, Google Inc., a for-profit corporation that is a wholly owned subsidiary of Alphabet Inc., and YouTube LLC a for-profit limited liability company that is wholly owned by Google Inc.

**RELATED CASES**

*Trump v. Facebook Inc. and Mark Zuckerberg*, filed in Federal District Court S.D. of Florida, #1:21-cv-22440.

*Trump v. YouTube LLC and Sunda Pichai*, filed in Federal District Court S.D. of Florida, #1:21-cv-22445.

*Trump v. Twitter Inc. and Jack Dorsey*, filed in Federal District Court S.D. of Florida, #1:21-cv-22441.

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## PETITION FOR WRIT OF CERTIORARI

The Petitioner, Bob Lewis, respectfully prays that a writ of certiorari be issued to review the ruling of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 15, 2021 for the reasons set forth below.

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## OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Lewis v. Google LLC*, 851 Fed. Appx. 723, 2021 U.S. App. LEXIS 10782, 2021 WL 1423118 and is designated as not for publication. (**App. 1-7**). The United States District Court for the Northern District of California is reported as *Lewis v. Google LLC*, 461 F. Supp. 3d 938, 2020 U.S. Dist. LEXIS 150603, 2020 WL 2745253 is designated as published. (**App. 8-53**).

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## JURISDICTION

Pursuant to the Court's COVID related order that allows petitions seeking review of orders within 150-day filing deadline for cases where a relevant judgment was issued prior to July 19, 2021, per Order 594, issued by the Court on July 19, 2021. Therefore this Court has jurisdiction to review the aforementioned Ninth Circuit Court of Appeals ruling pursuant to 28 U.S.C. § 1254.

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## **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

United States Constitution, First Amendment which states as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

47 U.S.C. § 230(c), which states as follows in pertinent part: (c) Protection for "Good Samaritan" blocking and screening of offensive material.

- (1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
- (2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—
  - (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
  - (B) any action taken to enable or make available to information content providers or others the technical means to

restrict access to material described in paragraph (1) [subparagraph (A)].

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### **STATEMENT OF THE CASE**

As a result of the Respondents censoring the Petitioner's protected speech on their platform YouTube.com for violating their hate speech policies, Then they unilaterally cancelled their revenue sharing agreement with the Petitioner under the pretext that advertisers are adverse to advertising on channels such as the Petitioner's because of his alleged hate speech violations. However, even today, the Respondents run advertisements during the Petitioner's videos, which undermines their claims. Then, the Petitioner started receiving reports from his subscribers that YouTube was not only refusing to notify them of his newly published videos, but also that the Respondents were actively unsubscribing them from his channel. All these things caused potentially irreparable brand damage to the Petitioner.

In August of 2019, Lewis filed the underlying suit in Colorado that led to this writ. In response, the Respondents filed a motion to dismiss based on § 230's indemnification clause. This led to the Lewis challenging the constitutionality of § 230, which is the core of this suit.

Then the underlying case was transferred to California and the California Federal Court dismissed the suit, inaccurately finding the Lewis never pled any

injury in fact. When the Ninth Circuit finally issued its ruling, it admitted that while Lewis did suffer injury, it was not due to § 230. It's important to note the Appellate ruling offered no meaningful explanation as to why § 230 wasn't necessarily implicated.

This writ followed.

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### REASONS FOR GRANTING THE WRIT

#### I. THIS COURT HAS HELD FIRST AMENDMENT PROTECTIONS APPLY TO SOCIAL MEDIA PLATFORMS

In 2017, this Court extended First Amendment protections to social media websites such as the YouTube.com platform owned and operated by Google, by designating them "digital public squares." *Packingham v. North Carolina*, 137 S. Ct. 1730, at 1736-1736, 198 L. Ed. 2d 273 (2017).

Yet, this fact has been ignored by both the Federal District Court of Northern California and the 9th Circuit Court of Appeals in this case by virtue of failing to apply the *Packingham* Standard to social media platform YouTube.com. (**App. 1-53**).

Therefore, because the Courts below refuse to follow the direction of this Court provided in *Packingham*, this writ should be granted.

## II. CENSORSHIP CONFERS STANDING TO CHALLENGE § 230

To have standing to challenge § 230, Lewis must demonstrate three elements: (1) he suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of Google in the Court below, and (3) that it is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, at 1547-1548, 194 L. Ed. 2d 635 (2016).

Lewis must also show he suffered an invasion of a legally protected interest that's "concrete and particularized" that is actual or imminent, not conjectural or hypothetical. For an injury to be "particularized," it must affect Lewis in a personal and individual way. Thus, standing requires that Lewis demonstrate he's personally suffered an actual or threatened injury. Particularization is necessary to establish injury in fact, but it is not sufficient by itself. An injury in fact must also be "concrete." A "concrete" injury must actually exist. When the U.S. Supreme Court has used the adjective "concrete," they mean the usual meaning of the term: "real," and not "abstract." Further, "concrete" is not always synonymous with "tangible." Although tangible injuries are easier to perceive, the U.S. Supreme Court confirmed that, in many cases, intangible injuries are also concrete. *Spokeo, Inc. v. Robins*, at 1548-1549.

More to the point, Lewis' § 230 constitutional challenge should not be lightly dismissed for lack of justiciable controversy since the normal injury in fact

standard for standing is to be relaxed in cases alleging facial overbreadth of a statute because of the danger of tolerating the existence of statutes susceptible to improper censorship in violation of the First Amendment, such as the case at bar. *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1025 n.1 (5th Cir. 1981).

Further, Lewis is claiming § 230 creates an acceptable species of censorship because it expressly allows censorship based on unconstitutionally vague terms such as, "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . ." which constitute a form of impermissible censorship. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968).

In Lewis' response to Google's motion to dismiss, Lewis attached and incorporated his second amended complaint ("SAC") as Exhibit 1 (**App. 54-142**). Thus, it's consideration was mandated by both Courts below, yet there is no indication in either order that they did so in any meaningful way.

In the SAC, the following injuries were pled: (1) Lewis' revenue contract was cancelled; (2) Lewis' videos were censored in a variety of ways; and (3) his video channel's reach was severely limited by Google. These acts combined caused Lewis brand damage and directly impacted revenues he previously received from the YouTube.com platform. (**App. 95-108**).

The District Court's order inaccurately stated these injuries never were pled. (**App. 26**). The Court of

Appeals claimed that while Lewis' censorship was an injury . . . it didn't apply to § 230, even though the District Court below dismissed all Lewis' claims based on § 230 protections after Google deployed it as an indemnification defense. (**App. 2**).

At best, the only conclusion any reasonable person can draw from these orders is that the District Court made its decision with its head in the sand, completely ignoring the record properly before it. Then, the Appellate Court, while admitting Lewis suffered injuries as a result of Google's censorship, stated those injuries didn't implicate § 230, even though Google employed it as a liability defense for censorship of Lewis.

Both rulings, in this regard, defy any rational or legal reasoning . . . which explains why both decisions related to this contain neither citations to the record, nor apply any relevant case precedent.

What makes these rulings even more egregious is that there is no indication in either the District Court's order, or in the Appellate Ruling that either court analyzed the facts in the underlying case below in the light most favorable to Lewis. *Sanders v. 11 Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986).

Were they afraid of a home visit from Antifa or BLM? If so, succumbing to this sort of fear constitutes a "heckler's veto" and only leads to the death of our constitutional republic.

Therefore, because the Courts below not only failed to view the facts in a light most favorable to

Lewis and ignored not only well-settled case precedent, but also ignored the undisputed facts related to Lewis' injuries as a result of Google's unconstitutional censorship, this writ should be granted.

### **III. § 230 IMPROPERLY DELEGATES THE REGULATION OF SPEECH TO PRIVATE PARTIES**

When Congress enacted § 230, it delegated its authority to regulate speech to private parties. In doing so, when a private party, in this case Google, uses § 230 as a liability defense to claims of First Amendment infringement, it *de facto* regulates speech on behalf of Congress by definition.

Yet, the Courts have previously held that Congress cannot pass a law that allows them to indirectly do what it may not do directly. Therefore, because the First Amendment bars Congress from enacting laws that allow the unrestrained censorship of protected expression, it also cannot enact laws that allow third parties or private parties to censor free speech in an unrestrained fashion either, which is exactly what § 230 does and is exactly the reason Lewis was censored by Google. This is because Google knew that § 230 would indemnify them for their First Amendment infringements on Lewis' protected speech . . . which is an express clause in § 230. *Elrod v. Burns*, 427 U.S. 347, 359 (1976); *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

Further, Google admitted in both Courts below they've censored Lewis based on violations of their policies . . . specifically, their hate speech policy. Yet, this Court has repeatedly and consistently ruled hate speech is protected speech under the First Amendment. *Matal v. Tam*, 137 S. Ct. 1744 at 1751, 198 L. Ed. 2d 366 (2017).

Therefore, because § 230 improperly delegates authority to unconstitutionally regulate censorship of Lewis' Speech to Google, this writ should be accepted.

#### **IV. GOOGLE AND YOUTUBE ARE JOINT-ENTERPRISE STATE ACTORS**

It's important to note that since this case was originally filed in August 2019, many sitting members of Congress and many other elected and unelected federal government officials have not only sanctioned Google's censorship, they have actively encouraged it. To that end, many in government have and continue to make public admissions of this and these admissions have been reported all over the media for at least two years.

In the case at bar, Lewis perceives the relevant state-actor test is the nexus test. Under this test, the Google's actions constitute state action when there's sufficiently close nexus between the state and the challenged action of the regulated entity so that the Google's actions may be fairly treated as those of the state itself. *Lansing v. City of Memphis*, 202 F.3d 821, at 830 (6th Cir. 2000).

Previously, the Northern District of California Federal District Court stated that a finding of state action through a joint-enterprise is appropriate where the defendant and the state engage in a joint enterprise with respect to the private party's challenged actions. In this case, the challenged action is the Google's regulation and censorship of Lewis' protected speech pursuant to § 230, the regulation of which is the purview of the State. *Quigley v. Yelp, Inc.*, 2017 U.S. Dist. LEXIS 103771.

Additionally, a private party's joint participation with the state in the seizure of disputed property interest is sufficient to characterize that party as a state actor. Lewis has a property interest in his protected speech and in Google continuing their revenue-sharing contract, free from discrimination. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).

Further, private parties, jointly engaged with the state in prohibited action, are acting "under color" of law. To act "under color" of law does not require that the accused be an officer of the State. It is enough that the party is a willful participant in joint activity with the State or its agents. *Id.* at 941.

While normally private parties cannot be held as state actors, there are exceptional circumstances in which there is a constitutional right to protection. Such a right may arise if a "special relationship" exists between the state and the private party. *Sargi v. Kent City Bd. Of Educ.*, 70 F.3d 907, 910-13 (6th Cir. 1995).

To reiterate, the joint-action test to determine when a private party can be considered a state actor is also present if a private party is a willful participant in joint action with the State or its agents, such as the case at bar. *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442 (10th Cir. 1995).

In *Jackson v. Curry County*, that Court dealt with a case very similar to the case at bar regarding a private party acting in a state capacity. In that case, the Court found the private party's action constituted state action. The Court applied the nexus test from the *Gallagher* Court stating: In *Gallagher*, the Tenth Circuit explained that under the nexus test, a plaintiff must demonstrate that "there is a sufficiently close nexus" between the government and the challenged conduct such that the conduct may be fairly treated as that of the State itself. *Gallagher*, 49 F.3d at 1448. Specifically, under the nexus test, a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State, such as the case herein. *Gallagher*, 49 F.3d at 1448. Further, the "required inquiry" under the nexus test "is fact-specific." *Gallagher*, 49 F.3d at 1448. *Jackson v. Curry Cty.*, 343 F. Supp. 3d 1103, 1110 (D.N.M. 2018).

In 2017, the U.S. Supreme Court in *Lewis v. Clarke* considered private parties acting on behalf of foreign sovereigns on American soil as state actors. In that case, the state actor in question was an employee and a member of an Indian Tribe, sued in his personal

capacity. Like the case at bar, the foreign sovereign was never named as a party. In that case, the Court stated that a state actor of a foreign sovereign could be held accountable for torts committed on U.S. soil. *Lewis v. Clarke*, 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017).

To reiterate, Google not only has censored Lewis, in part, as the result of encouragement from government officials, but they've also publicly admitted that they employ government officials, both domestic and foreign, as "trusted flaggers" to bring content to Google's attention for censorship. (**App. 10-11**).

Therefore, because § 230 transforms Google into a joint enterprise state actor who acts on the encouragement of government officials, this writ should be granted.

## **V. § 230 IS UNCONSTITUTIONALLY OVERBROAD**

Since § 230 allows content-based speech restriction, it can stand only if it satisfies strict scrutiny. If a statute allows the regulation of speech based on content, it must be narrowly tailored to promote a compelling state interest. If a less restrictive alternative would serve the states purpose, Congress must use that alternative. To do otherwise would be to restrict speech without adequate justification, a course the First Amendment does not permit. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 at 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865, 2000 WL 646196 (U.S. 2000).

The First Amendment of the U.S. Constitution states in pertinent part: "Congress shall make no law abridging the freedom of speech, or of the press."

Although § 230 would normally enjoy the presumption of constitutionality, this does not apply when there's a question of improper infringement on First Amendment rights. *Citizens for Better Environment v. Schaumburg*, 590 F.2d 220 (7th Cir. 1978), aff'd, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980).

When measuring § 230's constitutionality, free speech is always the preferred position. *Prince v. Massachusetts*, 321 U.S. 158, 165, 64 S. Ct. 438, 88 L. Ed. 645 (1944), *Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946).

To that end, Courts should generously interpret First Amendment guarantees. *Baxley v. United States*, 134 F.2d 937 (4th Cir. 1943); *Jones v. Moultrie*, 196 Ga. 526, 27 S.E.2d 39 (1943).

Further, this Court has held that the proper focus of any First Amendment analysis is the harm inflicted on the U.S. citizen, in this case Lewis. *Heffernan v. City of Paterson, New Jersey*, 136 S. Ct. 1412, 1418 (2016).

Additionally, when considering the constitutionality of § 230, which allows censorship, a system of censorship, or classification which places prior restraint upon expression there's a heavy presumption that it's unconstitutional. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469, 1 Media L. Rep. (BNA) 1111 (1957).

Also, when considering whether § 230 is unconstitutionally overbroad or vague, the danger that § 230 allows the silencing of some speakers whose messages may be protected under the First Amendment provides more reason for requiring a statute not be overly broad. § 230's burden on protected speech cannot be justified if the burden could be avoided by a more carefully drafted statute. *Reno v. ACLU*, 521 U.S. 844, 872, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

Further, the test of § 230's overbreadth turns on the extent to which it lends itself to improper applications to protected conduct, not whether it explicitly refers to speech or religion. *People v. Fogelson*, 21 Cal. 3d 158, 145 Cal. Rptr. 542, 577 P.2d 677 (Cal. 1978).

As previously stated, the First Amendment does not permit the government to do indirectly what it may not do directly, which in the case at bar, is privatize and empower Google to censor Lewis' protected speech. *Elrod v. Burns*, at 359; *Speiser v. Randall*, at 513, 526; *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986).

In this analysis, § 230 is void upon its face, irrespective of its application in a particular case, because it does not aim specifically at evils within allowable areas of state control, but, on the contrary, sweeps within its purview other activities that in ordinary circumstances constitute the exercise of protected expression . . . then delegates this unconstitutional authority to private parties. *Thornhill v. Alabama*, 310 U.S. 88, 60

S. Ct. 736, 84 L. Ed. 1093, 6 L.R.R.M. (BNA) 697, 2 Lab. Cas. (CCH) ¶17059 (1940).

To be clear, § 230 is void upon its face where sweeping, vague, and inexact terms of the statute are a threat to freedom of speech inherent in its existence. *Carlson v. California*, 310 U.S. 106, 84 L. Ed. 1104, 60 S. Ct. 746 (1940).

Thus, under First Amendment overbreadth doctrine, Lewis (whose own protected expression was censored) has standing and is permitted to challenge § 230 on its face because it also threatens others not before court. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987).

To this end, speech is not to be selectively permitted or proscribed according to official preference. *Child Evangelism Fellowship v. Anderson Sch. Dist. Five*, 470 F.3d 1062 (4th Cir. 2006).

In fact, the First Amendment exists to prohibit improper restraints on voluntary public expression of ideas. It shields Lewis who wants to speak or publish when Google wishes him silent; *Bartnicki v. Vopper*, 532 U.S. 514, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001).

Also, the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic, which is what § 230 allows. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S. Ct. 1722, 95 L. Ed. 2d 209, 13 Media L. Rep. (BNA) 2313 (1987).

To that end, Free Speech also includes the right to persuade others to change their views and cannot be censored simply because the speech is offensive. *Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000).

Therefore, for purposes of determining the validity of § 230's limit on speech under the Constitution's First Amendment, there is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001).

However, when Congress enacted 47 U.S.C. § 230 into law and included the following clause: "No provider or user of an interactive computer service shall be held liable on account of: (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . ." they passed a law so unconstitutionally vague and overbroad that it allows Google to regulate Lewis' constitutionally protected speech without liability, transforming them into joint-enterprise state actors. Since Google finds "hate speech" objectionable, they use this clause to corrupt § 230 to censor Lewis' protected expression on that basis as well. (**App. 15-18, App. 49-51**).

So we're clear, Lewis is not the Google's only victim, tens of millions of other Americans have had their

protected expression censored as well. This has been widely reported in the news and is common knowledge. Those censored under § 230's "otherwise objectionable" "hate speech" pretext for exercising protected expression include: pundits, government officials, political commentators, journalists, and active political candidates. In U.S. law, there's no "hate speech" exception to free speech protections and speech may not be banned on the ground that it expresses ideas that offend. *Matal v. Tam* at 1751.

The fact that § 230 allows any private party or online computer service to regulate protected speech, for any reason under the "otherwise objectionable" standard shocks the conscience and strikes at the heart of First Amendment overbreadth doctrine.

§ 230 isn't narrowly tailored limit censorship to target specific evils and doesn't define its terms. Further, because it privatizes government regulation of speech, which is barred by the Constitution and well-settled case precedent, it's unconstitutional on its face.

§ 230 allows Google to censor Lewis whenever and however they want, without consequence. So, even though the *Packingham* Court found that social media sites like YouTube.com are digital public squares where speech enjoys constitutional protections under the First Amendment, § 230, as written, allows Google to ignore U.S. Supreme Court decisions and void Lewis' protected speech, and is therefore overbroad on those grounds as well. *Packingham v. North Carolina* at 1736-1736.

To be potentially constitutional, § 230 should be narrowed in scope by removing the clause: "... otherwise objectionable, whether or not such material is constitutionally protected." These clauses allow censorship of speech based on an unlawful and constitutionally indefensible "hate speech" standard by virtue of this language when combined with the "otherwise objectionable" pretext.

The First Amendment's bar on enacting laws that allow the abridgment of Free Speech doesn't exempt laws that allow censorship delegated by Congress to private actors. So, even if this Court determines Google is a private party, that's irrelevant to whether or not § 230 is unconstitutional and void on its face, because § 230 transforms Google into joint-enterprise state actors, by virtue of empowering them to regulate and censor protected expression.

For these reasons, this writ should be granted and § 230 should be found unconstitutional and struck down.



**CONCLUSION**

For the reasons set forth herein, the Petitioner respectfully requests this Honorable Court grant the petition for a writ of certiorari.

Respectfully submitted this 13th day of September, 2021

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